APPENDIX "A"

OPINION BELOW OF

THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RANDOLPH v. RESOLUTION TRUST CORP.

Cite as 995 F.2d 611 (5th Cir. 1993)

Robert L. Randolph, et al., Plaintiff-
Counter Defendants Appellants

v.

RESOLUTION TRUST CORPORATION
As Receiver for First South Savings Association,
Defender-Counter Plaintiff Cross Plaintiff Third
Party Plaintiff Appellant-Appellee

v.

PHILLIPS, KING & SMITH, Attorneys
at Law, et al., Defendants Cross
Defendants Appellees,

v.

E. ASHLEY Smith, P.C., et al. Third
Party Defendants Appellees.

No. 92-2394

United States Court of Appeals,
Fifth Circuit.

July 19, 1993

Separate state court actions brought by bank to enforce promissory notes, by investors against bank fraud, and by investors and against law firm for malpractice were consolidated and removed to federal court when government took over as receiver of bank. The United States District Court for the Southern District of Texas, Norman W. Black, Chief Judge, entered judgment for the law firm on malpractice claims, and appeals were taken. The Court of Appeals held that: (1) investors' defenses to enforcement of notes were invalid under *D'Oench, Duhme*; (2) malpractice action of investor who tried to correct problems caused by malpractice was time barred; and (3) fact issues precluded summary

judgment on other claims.

Affirmed in part; vacated and remanded in part.[p.611]

James L. Cornell, Tammy C. Manning, Gilpin, Paxson & Bersch, Houston, TX, David R. Boyd, Joseph G. Davis, Linda A. Madrid, Washington, D.C., for RTC

Miller B. Walker, Jr., Gregory Lynn Hennig, Houston, TX, for Randolph, et al.

Daniel K. Hedges, Porter & Clements, Houston, TX, for Ashley & Smith only.

J. Preston Wrotenbery, Hirsch, Glover, Robinson & Sheiness, Houston, TX, for Phillips, King & Smith.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, DAVIS, and SMITH, Circuit Judges

PER CURIAM

I.

A.

In 1984, John Beeson entered into an agreement with two other individuals to purchase a controlling interest in Lincoln Savings & Loan ("Lincoln") in Miami, Florida. As counsel, the investors chose the firm of Phillips, King & Smith (the "Firm"). The Federal Home Loan Bank Board ("FHLBB") objected to the participation of the two individuals, and they withdrew. Beeson then collected a group of other investors,

including five of the appellants here (the Five Investors),and completed the transaction with the help of the Firm.

During this period, the Firm learned that FHLBB might raise questions about potential acting-in-concert violations involving the purchase of Lincoln. "Acting in Concert" refers to the aggregation of voting power when one or more persons, purporting to act independently, are actually acting as a group. The Firm's alleged knowledge of these potential problems was a central issue in the district court.

On January 5, 1985, First South loaned Beeson and the other investors over $5.4 million for the purchase of Lincoln. As security, Beeson pledged shares of common stock of Lincoln as well as 7.6382 acres of Texas real estate. On January 7, 1985, Beeson, the Five Investors, and several other investors purchased a controlling interest in Lincoln with the aid of the Firm.

In August 1985, the FHLBB began to investigate Lincoln, and the FHLBB examiner raised the acting-in-concert problem. Beeson consulted with the Firm regarding the issue, and the Firm decided that Beeson should buy out some of the other investors to attempt to solve the problem. On September 30, 1986, Beeson obtained from First South and extension and renewal of his earlier loan for $2,576,000 and a new loan for $689,295.50. As security, Beeson pledged 237,120 shares of Lincoln stock and his interest in two additional pieces of real estate.

In 1987, the FHLBB required Beeson and the Five Investors to withdraw from participation in Lincoln and placed Beeson's stock [p.613] in trust.[1] In June 1988, First South notified Beeson that it was accelerating his $2,576,000 note for failure to make payments on time. First South sent

notices of default to Beeson on August 4, 1988, and to other investors on January 19, 1989

B.

On January 31, 1989, First South initiated separate lawsuits against the Five Investors in the state district court. Beeson joined with the Five Investors in a separate suit against First South and the Firm on February 2, 1989, charging that the Firm and First South had fraudulently induced them to enter into the loan transactions that gave rise to the notes without disclosing their knowledge of potential regulatory problems that would arise in the stock transactions for which the funds were being borrowed. Beeson and the Five Investors (collectively, the "Plaintiffs") further contend that the fraudulent conduct caused the FHLBB to remove them from control of Lincoln, thus preventing them from infusing additional capital into Lincoln and using their expertise to save Lincoln.

On March 15, 1989, the FHLBB appointed the FSLIC conservator of First South pursuant to the Home Owners' Loan Act of 1933 and the Housing Act. Acting on behalf of the FSLIC, the Federal Deposit Insurance Corporation ("FDIC") removed all of the state court actions to federal court on April 14, 1989. With the enactment, on August 9, 1989, of the Financial Institutions Reform Recovery, and Enforcement Act of 1989, the Resolution Trust Corporation ("RTC") replaced the FSLIC as conservator of First South. The district court consolidated the actions on August 15, 1989. The RTC later was appointed receiver of First South and now litigates in that capacity. On April 27, 1992, the district court granted several motions for summary judgment;

this appeal followed.

The district court held that Beeson and the Five Investors could not succeed on their fraudulent inducement theory, as it was barred by the *D'Oench, Duhme* doctrine. See *D'Oench, Duhme & Co. v. FDIC* (1942). The district court also held that the legal malpractice actions of Beeson and the RTC were barred by the statute of limitations, while the malpractice action of the Five Investors was barred because there was no privity of contract.

II.

First, the Plaintiffs argue that the district court erred in holding that their defense of fraudulent inducement was barred by the doctrine of *D'Oench, Duhme*. While this appeal was pending, the RTC sold promissory of appellants Johnson, Randolph, Ranzau, and Altman. As to these notes, this appeal is moot. The RTC still retains three notes, however, thus requiring us to address the merits of the Plaintiff's argument.

A.

[1,2] Plaintiffs allege that their promissory notes are not negotiable because they employ a variable interest rate based upon a prime rate that is not ascertainable from the face of the note. In *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex.1992), the court held that promissory notes base upon the prime rate of an identified bank satisfied the 'sum certain' requirement thereby preserving negotiability. The court thus carved an exception of the 'four corners' rule that requires the 'sum certain' to be calculable from the

instrument itself without reference to an outside source. See TEX.BUS & COM CODE ANN § 3.106, comment 1 (Vernon 1968). The *Amberboy* decision, however, limits this narrow exception to situations where the prime rate is published or readily ascertainable by any interested person. 831.S.W.2d at 796.

[3] Here, the Plaintiffs assert that the interests rates for the various notes are not ascertainable from the face of the notes, thereby making n them nonnegotiable. We [p.614] find it unnecessary to decide whether these notes are negotiable, as the *D'Oench, Duhme* doctrine may defeat the Plaintiffs defenses to collection regardless of negotiability. See *RTC v. Montross*, 944 F.2d 227, 228 (5th Cir.1991) (per curiam) (en banc); *Park Club, Inc. v. RTC*, 967 F.2d 1053, 1055 (5th Cir. 1992). Although holder in due course status affects the types of defenses available against the RTC, these defenses still must be ascertainable from the records of the bank at the time the RTC takes control of the bank.

B.

[4] The plaintiffs argue that First South fraudulently induced them to sign the promissory notes. In *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir.1990),cert. denied, 498 U.S. 1883, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991), we held that the claims of fraudulent inducement were barred by *D'Oench, Duhme* even if the FDIC had prior knowledge of the fraud. We find no meaningful distinction between the present case and *Kilpatrick*.

C.

[5] Plaintiffs argue that because they had filed suit prior

to the failure of First South, the FDIC had knowledge of the fraud because the pleadings in the Plaintiffs' suit were among the 'records of the bank' when the FDIC took over. We reject this argument. Past precedent indicates the term 'records of the bank' refers to the note itself or related loan documents. See *Langley v. FDIC*, 484 U.S. 86, 91-92, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987). We hold that pleadings of a lawsuit do not constitute 'records of the bank' for the purpose of applying *D'Oench, Duhme*.

As the Court stated in *Langley*, the *D'Oench, Duhme* doctrine "allow[s] federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets ... [and] ensure[s] mature consideration of unusual loan transactions ... [thereby] preventing fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." 484 U.S. at 91-92, 108 S.Ct at 401. This passage suggests that the defense to payment of the note must be based upon evidence in the bank's records, it is not sufficient that the bank's records give notice of defense.

Here, the defense is barred because, although the FDIC may have been put on notice on plaintiffs' defense, the defense itself cannot be supported by the records of the bank. Were we to hold otherwise, federal and state banking authorities would be required to speculate as to the outcome of various lawsuits pending against the bank where such outcomes depend on oral testimony of bank officials. Such uncertainty is precisely what *D'Oench, Duhme* seeks to avoid. We affirm that the district court's holding on this issue.[2]

III.

Second, the Five Investors contend that the district court erred in granting summary judgment on their legal malpractice claim against the Firm. The District court held that no attorney-client relationship existed between the Five Investors and the Firm, thus barring a legal malpractice claim, as the parties were not in privity of contract. In reviewing the judgment, we view the facts in a light most favorable to the Five Investors and engage in a *de novo* application of the law to these facts.

[6, 7] In Texas, an attorney-client relationship may be implied from the conduct of the parties. *Kotzur v. Kelly*, 791 S.W.2d 254, 257-58 (Tex.App.–Corpus Christi 1990, no writ). An attorney may be held negligent when he fails to advise a party that he is nor representing that party, when circumstances lead the party to believe that the attorney is representing him. *Id.* Because each case presents unique circumstances, we must be cautious to avoid granting summary judgment prematurely. [p.615]

In *Kotzur*, a son brought a piece of property from his father. The father hired Kelly to prepare the documents for the transaction, and Kelly represented to the parties at the closing that the property had no liens on it, other than those shown on the deed. The son later had to pay off a lien that Kelly had missed, and he sued Kelly for malpractice. In reversing a summary judgment in favor of Kelly on the privity issue, the court had stressed several facts. First, Kelly knew that the son did not a have a separate attorney, and he admitted that he had prepared documents on a "family-type" basis. Second, the son testified that it was his impression that Kelly was handling the documents and that he thought Kelly

was representing him. Third, the son noted that Kelly never had told him that he was not representing the son or that the son should retain as separate lawyer. Finally, the closing statement reflected a charge to the son for attorneys' fees.

[8] We find this case similar enough to *Katzur* that we vacate the judgment of the district court and remand. The Five Investors instructed Beeson to arrange for legal representation for himself and the other investors in connection with the Lincoln purchase. Interpreting the facts most favorably to the Five Investors, Beeson acted as their agent.

None of the Five Investors had any legal representation other than from the Firm, either in connection with the purchase of Lincoln or with the investigation by the FHLBB. When First South made the loans, some of the loan proceeds intended for the Five Investors were paid tot he Firm for legal fees. The Firm requested and obtained conflict of interest waivers from three of the Five Investors as well as from Beeson and the other original investors. The Firm also prepared option agreements to allow two of the initial investors to purchase a portion of Beeson's stock.

The evidence is sufficient to reverse the summary judgment. The Firm relies upon the Five Investors' answer to interrogatories 5 and 10, which inquired as to when each person retained the law firm and what he consulted the firm about. The answers are as follows:

5. I have never directly consulted the 'defendant attorney' ... rather the 'defendant attorney' was retained by John S. Beeson, one of the Plaintiffs herein, for the legal representation and advice in connection with the purchase by Plaintiffs and others of Lincoln Savings Association.

10. As stated above, the 'defendant attorney' was retained by

the Plaintiff John S. Beeson to represent all purchasers of Lincoln Savings Association.

Because this evidence shows that none of the Five Investors ever dealt directly with any attorney of the Firm, the firm argues that this proves that no attorney-client relationship existed. We disagree. As we noted above, the Five Investors contend that Beeson retained the Firm for himself as agent for the Five Investors. Viewing the evidence most favorably to the Five Investors, this evidence is consistent with the Five Investors' theory.[3]

[9] We also reject the Five Investors' argument that they may sue for legal malpractice even if there was no attorney-client relationship because the Firm knew that Beeson would supply the Five Investors with information. This argument has no merit. Texas courts repeatedly have held that only one in privity of contract with an attorney may maintain a legal malpractice action against him. *E.g.*, *Dickey v. Jansen*, 731 S.W.2d 581 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e).

Given our resolution of this issue, we reverse summary judgment of the Five Investors' legal malpractice claim. A material issue of fact exists as to the question of whether an attorney-client relationship existed between [p.616] the Five Investors and the Firm, but only because the Five Investors have asserted that Beeson acted as their agent in retaining the Firm. As a result, when we consider whether the legal malpractice claims are barred by the limitations, Beeson's knowledge as agent must be imputed to the Five Investors. With this background in mind, we now turn to the statute of limitations issue.

IV.

[10] Third, Beeson and the Five Investors contend that the district court erred in granting summary judgment in favor of the Firm on the ground that their legal malpractice claims were barred by Texas' two-year statute of limitations for legal malpractice claims, TEX.CIV.PRAC & REM.CODE § 16.003. Plaintiffs filed their lawsuit on February 8, 1989, making the critical date for accrual February 8, 1987.

A.

> As the Texas Supreme Court has observed, the general rule is that a cause of action sounding in tort accrues, in the absence of statute to the contrary or fraudulent concealment, when the tort is committed. This rule obtains notwithstanding the fact that the damages, or the extent, are not ascertainable until a later date ... A legal injury must be sustained, of course, before a cause of action accrues.

Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex.1967). See also *McClung v. Johnson* 620 S.W.2d 644, 646 (Tex.Civ.App.–Dallas 1981, writ ref'd n.r.e.) (cause of action sounding in tort accrues when the tort is completed, that is, the act committed and damage suffered).[4] In other words, Texas law imposes two requirements for the accrual of a legal malpractice cause of action: (1) the commission of tortious act and (2) the suffering of legal injury.

B.

[11,12] We understand the district court to have granted a

summary judgment based upon its findings regarding the "tortious act" requirement. The district court's order does not discuss the "legal injury" requirement.

We agree with the district court that no issue of material fact exists as to the first element. Beeson knew about the acting-in-concert problems long before the critical date. He had even negotiated with the FHLBB in an attempt to rectify the problem. If the Five Investors successfully prove that Beeson acted as their agent in establishing an attorney-client relationship, then Beeson's knowledge of the acting-in-concert problem also must be imputed to the Five Investors.

C.

1.

[13] the second requirement, that legal injury must have occurred, presents a more difficult problem.[5] The Firm identifies three possible legal injuries that the plaintiffs allegedly suffered prior to the critical date. First, it notes that the FHLBB began investigating Lincoln in mid-1985 regarding the acting-in-concert problem. In October 1985, the FHLBB issued its preliminary report, which concludes that Beeson and the others [p.617] acted in concert. We do not think the issuance of a preliminary report constitutes a legal injury, however, as the Firm does not cite any authority indicating that a preliminary report would allow the government to take any coercive action.

[14] At best, the filing of a preliminary report indicated that some legal injury was inevitable, but in Texas, even inevitable injury will not result in the accrual of a cause of action for the limitations purposes in Texas. In *Atkins v.*

Crosland, 417 S.W.2d 150, 153 (Tex.1967), an accountant made errors on the plaintiff's tax return in 1958 and 1960. The last tortious act occurred no later than December 31, 1960. The critical date for limitations purposes was September 30, 1961, so the two-year statute would have run by December 31, 1962; suit was not filed until September 30, 1963. On October 20, 1961, the Internal Revenue Service ("IRS") assessed a deficiency. The court held that no legal injury occurred until the IRS assessed the deficiency, quoting 54 C.J.S. Limitation of Actions § 168, at 122-23, for the following test of when a cause of action accrues:

> The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and the statute begins to run, when, and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that the injury will inevitably result.

417 S.W.2d at 153

Applying *Atkins* to this case, we conclude that a mere investigation and preliminary report of the FHLBB does not constitute a legal injury, as the FHLBB had not yet taken any

action that invaded a right of the plaintiffs. In *Atkins*, the cause of action accrued when the deficiency was assessed, not when the audit proceeding began. The *Atkins* court also cited to a case involving question of when a cause of action accrues for negligent failure of an insurance company to settle a lawsuit. The court concluded that the cause does not accrue until the final judgment is reached, as the tort was not completed until that time, for no right had been invaded by the failure to accept the settlement offers. 417 S.W.2d at 153-54. Similarly, here, a preliminary report in no way invades any right of the plaintiffs as, at the point, Beeson and the Five Investors might have successfully challenged the findings in the preliminary report.

2.

We find no merit in the Firm's second argument. In response to the investigation by the FHLBB, Beeson attempted to rectify the situation by buying out two of the other investors. To accomplish this buyout, Beeson had to take out further loans from First South. Beeson argues that buying the other stock cannot be equated with damage to him, because if it had not been for the Firm's malpractice, the stock purchase may well have been advantageous to him. This may be true, but Beeson went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by the Firm's malpractice. Although it was Beeson's choice to attempt to rectify the situation in this manner, he entered into the transaction because of the acting-in-concert problem. We believe that this constituted a legal injury. We therefore affirm as to Beeson.

3.

Beeson's buyout, however, did not cause further expense to the Five Investors. As a result, we must consider the third alleged legal injury. The Firm argues that plaintiffs were damaged when the FHLBB issued its final exam report in February 1986 and sent Beeson two proposed cease and desist orders on July 8, 1986.

We asked the parties to submit supplemental briefing on the effect of these proposed orders. Unfortunately, we cannot adequately determine, from the present state of the record, exactly what effect those orders had on the legal rights of the Five Investors. If the proposed orders affected the Five Investors, they might well have suffered legal injury. [p.618]

Because the proposed orders do not appear in the record, the district court is in a better position to resolve the issue as to whether legal injury occurred. We therefore vacate the summary judgment as to the Five Investors and remand for determination of whether a material issue of fact exists a as to whether they suffered any legal injury prior to the critical date. In making this determination, the district court should carefully consider the holding in Atkins. There, the cause of action did not accrue until the IRS issued a deficiency. The time at which the IRS began investigating Atkins apparently was irrelevant and is not mentioned in the opinion. Here, the Final Exam report may do nothing more than warn the plaintiffs that future coercive action is inevitable. But, inevitable injury does not constitute sufficient injury to begin the running of the statute of limitations under Atkins.

V.

The RTC argues that the district court erred in granting

summary judgment on its legal malpractice claim as time-barred because the principals at First South were aware of the possible acting-in-concert problems more than two years prior to the time the RTC filed its complaint. Again, the district court does not appear to have made a finding as to when First South suffered legal injury. In the district court, the RTC apparently argued that FIRREA revives an otherwise stale claim under 12 U.S.C. § 1821(d)(14). The district court rejected this argument, and we since have ruled that FIRREA does not receive stale claims. See *FDIC v. Belli*, 981 F.2d 838, 842-43 (5th Cir.1993).

According, the relevant statute of limitations is 28 U.S.C. § 2415, which denotes a three-year period for tort actions brought by the government.6 Under this statute, our inquiry is whether the cause of action accrued prior to April 24, 1986—three years before the suit was filed. Of course, this would be the critical date only if the claim was stale under the state statute of limitations when First South failed.

We previously have noted that neither section 1821(d)(14) revives claims barred under state law where the FDIC takes over after the claim has prescribed. See *Belli*, 981 F.2d at 842 (section 1821 (d)(14)); *FDIC v. Wheat*, 970 F.2d 124, 128 n. 7 (5th Cir.1992) (citing *United States v. Sellers*, 487 F.2d 1268, 1269 (5th Cir.1973)) (section 2415). The FSLIC took over First South on March 15, 1989. Because the FSLIC filed the relevant claims against the Firm one month later, the relevant question becomes whether the claims were barred under Texas law on March 15, 1989; if the cause of action accrued before March 15, 1987, it is barred by the state statute of limitations and may not be revived by federal law.

[15] Assuming that the claim is not barred under Texas law, it is timely under federal law, as the FSLIC filed it within the three-year federal limitations period, because a finding in favor of the RTC on the state law issue means that the claim must have accrued after April 24, 1986. Because the critical date under federal law is April 24, 1986, nearly one year earlier that the critical date under state law, the only relevant inquiry is whether the claim prescribed under Texas law.[7]

The RTC first argues that a cause of action does not 'accrue,' under the meaning of that term in section 2415, until the government entity acquires the claim in question. We rejected that reading in *Belli*, 981 F.2d at 840-42. Although in Belli [p.619] we interpreted section 2415(a), our rationale is equally applicable to the provision deals with contract actions, while the latter addresses tort actions. The relevant language is identical. As a result, we reject the RTC's first argument.

[16] The RTC next argues, as did Beeson and the Five Investors, that it do not sustain damages as a result of the breach of duty before the critical date. As we noted above, the cause of action does not accrue until the breach of duty causes legal injury. The RTC argues that it did not sustain any such injury until it was forced to look to the collateral for payment on the notes. The RTC asserts that the Firm produced no evidence in the summary judgment record to establish when First South sustained damages as a result of the alleged breach of duty.

Because the district court failed to make findings as to when First South suffered legal injury, we vacate the judgment as to the RTC's malpractice claim and remand for fur-

ther proceedings.[8] The district court is better situated to decide whether a material issue of fact exists as to when First South suffered a legal injury. The record is sufficiently opaque that we cannot determine with certainty that a material issue of fact does not exist on this issue.[9]

VI.

In summary, we AFFIRM the grant of summary judgment in favor of the RTC on the promissory notes as to Beeson and Foster and DISMISS the appeals of Johnson, Randolph, Ranzau, and Altman on this issue as moot. We AFFIRM the grant of summary judgment against Beeson on his malpractice claim and VACATE the summary judgment against Foster, Johnson, Randolph, Ranzau, and Altman on their malpractice claims and REMAND for further proceedings. We VACATE the summary judgment against the RTC on its legal malpractice claim and REMAND for further proceedings. [p.620]

Footnotes

1. Lincoln was taken over by the Federal Savings and Loan Insurance Corporation ("FSLIC") in 1989 and later placed under conservatorship of the Resolution Trust Corporation ("RTC"). Its stock is worthless.

2. Beeson also raises an issue as to the failure of the delivery as to one note. Because Beeson accepted the loan proceeds, any defect was cured. See Texas *Reserve Life Ins. v. Security Title Co.*, 352 S.W.2d 347 (Tex.Civ.App.–San Antonio 1961, writ ref'd n.r.e.) (express ratification of a defective delivery renders it a good delivery)

3. We reject the Firm's argument that the Five Investors did not plead that the Firm never told them the Firm was not representing them. The Five Investors pled that the Firm represented them; that allegation met requirements of Fed R.Civ.P.8. After properly pleading this allegation, the Five Investors were free to offer any evidence supporting it. The district court erred by holding that the Five Investors had to plead this fact as such s standard would be plainly inconsistent

with rule 8.

4. Texas courts have also held that the traditional discovery rule applies in legal malpractice cases. *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex.1988)

5. The Firm argues that Beeson and the Five Investors are seeking to employ the discovery rule without pleading it. The parties disagree over who has the burden of pleading the discovery rule and whether the rule applies in this case. Although the discovery rule must be pled in state court, see *Woods V. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988), the same is not true in federal court, see *Wellborn v. Sears, Roebuck & Co.*, F.2d 1420, 1425 (5th Cir.1992).

Although the discovery rule still can be urged, it does not appear to apply in this case. Beeson's main argument is that he did not suffer legal injury until after the critical date. The discovery rule prevents a cause of action from accruing after the tortious act has been committed, and legal injury suffered, when the plaintiff has not discovered either the act or the injury. Here, Beeson knew about the alleged tortious act and about the events that the Firm alleges constitute legal injury. He can prevail only if he proves that these events do not constitute a legal injury, thereby making the discovery rule irrelevant.

6. The RTC's attempt to re characterize a legal malpractice action as a contract action rather than a tort action is unpersuasive. Under Texas law, a legal malpractice action sounds in tort. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex.1988). Although we are interpreting a federal statute of limitations, we think it proper to rely upon state characterizations of the state causes of action for limitations purposes.

7. In other words, legal malpractice claims brought by the RTC on behalf of a financial institution involve two different critical dates for limitations purposes. First, the government must take over the institution before the cause of action has gone stale under state law, in this case meaning that the time between accrual of the cause action and the government takeover of the institution must be less than two years. Second, even if the government takes over the failed institution before the claim has gone stale under state law, the government must file the action within three years of the accrual of the claim. A court ordinarily will have decide only one of the two issues, because the answer to one will dictate the result of the second.

8. The RTC's second amended complaint alleges that the Firm's malpractice caused the FHLBB to attack the borrowers' change of control application, which caused the borrowers' stock in Lincoln to become worthless, which, in turn, left First South's loans to the borrowers inadequately secured. Assuming these well pleaded facts are true, it is not evident why the FHLBB's February 1986 final examination report and proposed cease and desist orders did not cause an immediate reduction in the value of the borrowers' stock in Lincoln. It is even less

plain why the reduction in the value of the stock did not reduce the value of the promissory notes secured by the stock, and, therefore, constitute injury to First South. Nevertheless, the parties did not flesh out these arguments well in their briefs, and we leave them to the district court for its determination.

9. Charles Phillips was the Chairman of First South and a partner of the Firm. The RTC argues that Phillip's knowledge should not be imputed to First South for the purpose of applying the discovery rule. Although this assertion has merit, the summary judgment record contains ample evidence to indicate that the other officers of First South knew of the acting-in-concert problems and the Firm's involvement with the Lincoln transaction well before the critical date. As a result, we agree with the district court that First South had notice of the alleged breach of duty prior to the critical date. The RTC also raises the "adverse domination theory" on appeal. Because the RTC did not raise this argument in the district court, however, we elect not to address it for the first time on appeal. See *Boddie v. City of Columbus*, 989 F.2d 745, 752 (5th Cir.1993).

APPENDIX "B"

OPINION BELOW OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT L. RANDOLPH, et al.,	§	
	§	
Plaintiffs	§	
	§	
vs.	§	CIVIL ACTION NO. H-89-1302
	§	
FIRST SOUTH SAVINGS	§	
ASSOCIATION and RESOLUTION	§	
TRUST CORPORATION, as	§	
Conservator for the First	§	
South Federal Savings	§	
Association, by the Federal	§	
Deposit Insurance Corporation	§	
as Manager for the Conservator,	§	
et al.,	§	
Defendants	§	

ORDER

Pending before the Court are the following motions: a motion for summary judgment by the Resolution Trust Corporation ("RTC") as receiver of First South Savings Association ("First South"), a motion for summary judgment by the Law Firm Defendants, and a motion for summary judgment by the Third-Party Defendants. For the reasons below, the Court finds all three motions should be granted.

I. RTC's motion for summary judgment

This lawsuit involves a series of promissory notes executed by Robert Randolph, John Beeson, Richard White, Bob Johnson, Lynn Foster, M.D. Altman, and Dennis Ranzau ("the borrowers") in favor of First South. The borrowers used the proceeds from the loans to purchase a major-

ity of the stock in [p.1] Lincoln Savings and Loan Association ("Lincoln"). In August 1985, following the borrowers' purchase of the Lincoln stock, the Federal Home Loan Bank Board ("bank board") began an investigation of the stock purchase, expressing concerns over possible acting in concert problems. In 1987, after issuing a cease and desist order, the board required Beeson and those borrowers who were members of Lincoln's Board of Directors to resign and to relinquish their Lincoln stock.

On January 31, 1989, First South filed a lawsuit against the borrowers in the District Court of Harris County to recover the amounts owed on the promissory notes. The borrowers filed a subsequent lawsuit seeking cancellation of their notes and damages against First South and the lawyers who represented them in the stock purchase.

On March 16, 1989, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator of First South. The FSLIC removed the lawsuit to federal court. Later, the RTC succeeded to the rights and powers of the FSLIC as conservator of First South. On July 12, 1991, First South was placed in receivership, and the RTC was appointed receiver. The RTC has filed a motion for summary judgment to recover the amount owed on the notes.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The United [p.2] States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In support of its motion for summary judgment, the RTC

attaches copies of the seven promissory notes executed in favor of First South. The RTC also provides the affidavit of Dana Curtis, site manager for the Resolution Asset Contractor of First South, who testifies that each of the seven borrowers defaulted on payment of his note and that each of the seven failed to make payment following demand. Ms. Curtis testifies that the RTC is the owner and holder of the seven promissory notes executed by the borrowers in favor of First South.

There is also evidence that the note executed by Beeson was secured by Beeson's interest in two parcels of real estate in Houston. In support of its motion for summary judgment, the RTC attaches a copy of the deed of trust covering the two parcels of land. The evidence shows that after providing proper notice, the RTC sold the property securing Beeson's note at a foreclosure sale. First South purchased both properties for a total of $900,000.00. The RTC credited this amount to the principal amount owed on Beeson's note.

In Texas, the maker of a promissory note promises to make payment in accordance with the note's terms. Tex. Bus. & Comm. [p.3] Code Ann. § 3.413. The RTC, as holder of the notes, is thus entitled to judgment for the unpaid amounts if there are no valid defenses against enforcement of the notes.

In response to the RTC's motion for summary judgment, the borrowers allege that First South had "actual or imputed knowledge of the change of control problems regarding the purchase of Lincoln stock." The borrowers seek damages against First South for failing to advise the borrowers of the problems concerning the purchase of Lincoln stock and for agreeing to execute the loans in view of these problems. The borrowers' affirmative claims include negligence, common law fraud, and fraud in the inducement.

In addition, Beeson seeks cancellation of his note because of First South's alleged wrongful foreclosure of the collateral property. Beeson contends that First South required

him to show that Beeson's title to the collateral property was free and clear of encumbrances before the savings and loan would loan him funds. Beeson alleges that Title USA Company informed Beeson that he would have to pay $57,000.00 in fees and taxes to obtain a clear title to the land. Beeson contends that despite his failure to pay the required amount, the loan documents, "somehow, without the knowledge or consent of Beeson, came into the possession of First South." Beeson alleges the foreclosure sale was invalid because of First South's handling of the loan documents.

The Court finds that the borrowers' defenses and affirmative claims against the RTC are barred by the doctrine established in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). [p.4] The *D'Oench. Duhme* doctrine precludes the use of unrecorded side agreements between the bank and the borrower as the basis of either claims or defenses against the FDIC. The Fifth Circuit Court of Appeals has held that the doctrine protects the FDIC from the effect of unrecorded agreements even if the FDIC as receiver had knowledge of the contents of the agreement. *Kilpatrick v. Riddle*, 907 F.2d 2121 (5th Cir. 1990).

The doctrine has been codified at 12 U.S.C. § 1823(e), which provides that no agreement which tends to diminish or defeat the FDIC's right, title, or interest in an asset is valid unless the agreement:

1. Is written;
2. Was executed by the bank and the parties claiming an adverse interest under the agreement contemporaneously with the acquisition of the asset by the FDIC;
3. Was approved by the bank's board of directors or loan committee, and the approval is noted in the minutes of either;

4. Was continuously, from the time of its execution, an official record of the bank.

12 U.S.C. § 1983(e). The statute also provides that the *D'Oench Duhme* doctrine and § 1823(e) apply to both the RTC and the FDIC in their receivership capacities. Because FIRREA prevents the borrowers from recovering on their affirmative claims against the RTC and precludes the borrowers from asserting their defenses, the RTC is entitled to recover the amounts owed on the notes. [p.5]

II. Defendants' Motion for Summary Judgment

In addition to suing First South, the borrowers also seek damages against the "law firm Defendants." The borrowers allege that Defendants gave negligent advice concerning the purchase of Lincoln stock and were negligent in drafting the loan documents relating to the takeover. The basis of the borrowers' complaint is a letter written by Defendant Charles Harrell on December 31, 1984 to the bank board. The borrowers allege that Harrell represented in the letter that the borrowers were acting in concert.

The borrowers claim that Defendants' negligence resulted in the board's finding that the borrowers were acting in concert. The RTC has also asserted a claim seeking contribution and indemnity in the event Plaintiffs recover on their legal malpractice allegations. In addition, the RTC amended its cross action against the law firm Defendants to add a third-party complaint against the individual members of the law firms ("third party Defendants"). In its amended cross-action, the RTC also asserts an independent legal malpractice allegation against these defendants. Both the law firm Defendants and the third-party Defendants have filed motions for summary judgment. The Court will address both motions.

The Court is aware of Defendants' argument that the proper law firm Defendant has never been sued. Because the

name of the law firm which Beeson retained to provide legal representation changed several times during the relevant time period, the Court is inclined to agree with Defendants. However, in order to facilitate [p.6] a resolution of this lawsuit, the Court will address the parties' arguments and motions as if the proper entity had been served.

At the outset, the Court is of the opinion that all the borrowers' claims, except those allegations asserted by John Beeson, lack merit in view of the absence of privity between the parties. In Texas, an attorney owes no duty to a third party in the absence of privity of contract. *First Municipal Leasing Corp. v. Blankenship. Potts. Aikman Haqin & Stewart*, 648 S.W.2d 410, 413 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). In addition, persons outside the attorney-client relationship have no cause of action for injuries they might sustain as a result of an attorney's failure to perform a duty owed to a client. *Dickey v. Jansen*, 731 S.W.2d 581 (Tex.App.—Houston [lst Dist.] 1987, writ ref'd n.r.e.).

The evidence shows that Beeson retained the law firm Defendants to provide legal representation concerning the takeover of Lincoln. Defendants attach copies of interrogatory answers in which the other borrowers testify as follows concerning their relationship with the law firm:

> I have never directly consulted with the defendant-attorney . . . rather the defendant attorney was retained by John S. Beeson, one of the Plaintiffs herein. . . .

In addition, in response to inquiries involving the legal malpractice allegations, the borrowers testify as follows: "I have no direct personal knowledge of these inquiries but would refer you to Plaintiff John S. Beeson who dealt directly with the defendant attorney." [p.7]

In response to Defendants' arguments concerning lack of privity, Plaintiffs make the following arguments: (1) the law

firm Defendants' fees were paid from proceeds of the loans obtained from First South; (2) the borrowers had no other legal representation in connection with the takeover of Lincoln; (3) the law firm Defendants were aware that the borrowers relied on the lawyers' representation; and (4) the borrowers authorized Beeson to retain the law firm Defendants on their behalf. As evidence in support of their arguments, the borrowers provide the affidavit of Beeson who testifies that he retained the lawyers to represent all the borrowers and that legal fees were paid from First South loan proceeds.

The Court finds that the borrowers have failed to provide legal authority to support their arguments. Citing *Kotzer v. Kelly*, 791 S.W.2d 254 (Tex.App.—Corpus Christi 1990, no writ), the borrowers argue that an attorney may be held liable for negligence when he fails to advise a party that he is not representing him when circumstances would lead the party to believe that the attorney is providing representation. However, the borrowers' pleadings do not contain such an allegation. In the absence of authority for their argument that the borrowers should obtain the benefits of the attorney-client relationship between Beeson and the law firm, the Court finds that only Beeson is entitled to assert legal malpractice allegations against Defendants.

In support of their motion for summary judgment, Defendants also argue that Beeson's legal malpractice claims are [p.8] barred by the applicable statute of limitations. The Court agrees. In Texas, tort actions for legal malpractice must be brought within two years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.003. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The cause of action is said to accrue when a plaintiff, through the exercise of ordinary diligence, knew or should have known the facts establishing the elements of his cause of action. *Id.* at 646. The Court is of the opinion that Beeson's causes of action accrued at least four years prior to the commencement of

suit.

Beeson first asserted his claims against Defendants by filing his state court petition on February 8, 1989. The evidence shows that in August 1985 the bank board began to investigate the purchase of Lincoln stock. In Plaintiff's original petition, Beeson alleges that he learned at that time that the bank board was inquiring into the possibility that there was an acting in concert problem concerning the purchase of Lincoln stock by certain borrowers. On October 25, 1985, Beeson received a copy of the bank board's preliminary report, which contained allegations that the borrowers were acting in concert.

The evidence shows that on November 5, 1985, Beeson sent a letter to the bank board in which he outlined his proposals for eliminating any appearance of conflict existing at Lincoln. In their motion for summary judgment, Defendants argue that as early as November 1985 Beeson was well aware of the possible acting in concert problems. [p.9]

In response to Defendants' statute of limitations argument, the borrowers argue that a fact question exists concerning when Beeson and the other borrowers became aware of the facts concerning their allegations. As evidence in support of their argument, the borrowers provide the affidavit of Beeson who testifies as follows:

> At no time did either Harrell or Levi tell me the FHLBB would find anything objectionable with anything set forth in Harrell's letter. Presumably if Harrell or Levi thought that there was anything in the matters set out in the Harrell letter that the FHLBB would find objectionable they would have told me and the other purchasers.

Because Plaintiff's evidence fails to raise a fact question concerning whether Beeson knew of the possible acting in

concert problems before November 1985, the Court finds that Beeson's allegations against Defendants are barred by the applicable statute of limitations.

The Court finds that the RTC's legal malpractice allegations against the law firm Defendants are also barred by the two-year statute of limitations. The FSLIC as conservator of First South filed a cross action against Defendants seeking contribution and indemnity on April 24, 1989. After becoming conservator of First South, the RTC amended its complaint, adding an independent legal malpractice allegation. In its first amended cross-action, the RTC alleges that Defendants should have notified the board o First South of the risks of allowing the borrowers to use the Lincoln stock as security for their loans. [p.10]

The evidence before the Court shows that the principals of First South were aware of the possible acting in concert problems at least two years prior to the time the RTC filed its complaint against Defendants. At his deposition, Beeson testified that in August 1985 after receiving the preliminary report of the bank board's investigation of Lincoln he orally notified First South and Charles Phillips, First South's chairman, of the board's findings. There is also evidence that William King, one of the law firm Defendants, consulted with Phillips throughout the Lincoln takeover concerning the possible acting in concert problems. The Court therefore finds that prior to the end of 1985 First South knew or should have known of any claim it might have had against Defendants.

In the event the Court finds the borrowers and First South's claims against Defendants are time-barred, the RTC argues that FIRREA revives these allegations. In *FDIC v. Shrader & York. et al*, CA No.H-91-1372 (S.D.Tex. 1991), this Court held that FIRREA does not revive claims which are already barred at the date of conservatorship. In the absence of a ruling from the Fifth Circuit Court of Appeals that the Court erred in its reading of the statute, the Court is

not inclined to change its prior holding. Thus, the Court finds that First South's claims are barred by the applicable statute of limitations and FIRREA does not revive the causes of action.

For the reasons above, it is therefore [p.11]

ORDERED that the RTC's motion for summary judgment for recovery on the notes (entry #71) is GRANTED. It is further

ORDERED that the law firm Defendants' motion for summary judgment (entry #72) is GRANTED. It is further

ORDERED that the third-party Defendants' motion for summary judgment (entry #74) is GRANTED.

All other motions are denied as moot.

Signed this 27th day of April, 1992 at Houston, Texas.

NORMAN W. BLACK

UNITED STATES DISTRICT JUDGE [p.12]

APPENDIX "C"

DENIAL OF MOTION FOR REHEARING

BY THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2394

ROBERT L. RANDOLPH, ET AL.,

Plaintiffs and Counter
Defendants-Appellants,

versus

RESOLUTION TRUST CORPORATION,
As Receiver for FIRST SOUTH
SAVINGS ASSOCIATION,

Defendant-Counter Plaintiff
and Cross Plaintiff-Third
Party Plaintiff
Appellant/Appellee,

versus

PHILLIPS, KING & SMITH, Attorneys at Law, Et Al.,

Defendants-Cross
Defendants-Appellees,

versus

E. ASHLEY SMITH, P.C., Et Al.,

Third-Party Defendants
Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING
(SEPTEMBER 15, 1993)

Before WISDOM, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4